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IN THE

SUPREME COURT OF THE UNITED STATES

No. 620

OCTOBER TERM, 1963

BOEING AIRPLANE COMPANY,
Petitioner,

vs.

ARTHUR E. PERRY, As Special Administrator of the Estate of James W. Sullivan, Deceased; and COLENE SULLIVAN, As Widow of James W. Sullivan, Deceased; and CYNTHIA LYNN SULLIVAN, a Minor, by and Through Colene Sullivan, Her Mother, As Natural Guardian and Next Friend,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Boeing Airplane Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on September 16, 1963 (Appendix A, p. A1). The

judgment affirmed a ruling of the United States District Court for the District of Kansas in favor of Respondents (the plaintiffs in the District Court) but which ruling included a finding that its order involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. An appeal was allowed by the court below pursuant to 28 *U.S.C.* 1292(b). The Court of Appeals remanded the case for further proceedings.

The litigation involves an action brought by a Nebraska special administrator for the exclusive benefit of a widow whose husband was killed while flying as a member of the United States Air Force a B-47 aircraft manufactured by Petitioner. The widow obtained compensation from the United States and pursuant to 5 *U.S.C.* 776 and at the request of the United States, assigned to the United States all of her right, title and interest in and to any claim for damages against Petitioner, Boeing Airplane Company, together with all rights of action thereunder. Both the District Court and the Court of Appeals allowed the proceeding to continue as brought by the Nebraska special administrator (for the exclusive benefit of the widow) without requiring the United States to whom the cause of action had been assigned, to be added or substituted as a party.

OPINIONS BELOW

The District Court's Memorandum of Opinion and order* (Appendix B, p. A6) is not reported. The opinion

*Reproduced Record in Court of Appeals, Memorandum of Opinion, p. 8, Order, p. 11.

of the Court of Appeals** for the Tenth Circuit, entered September, 16, 1963 (Appendix A, p. A1) is reported in 322 F.2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered September 16, 1963,** (Appendix A, p. A1). A Petition for Rehearing was filed October 7, 1963 (R. 5). On October 16, 1963, the Court of Appeals denied the Petition for Rehearing (R. 6). The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* 1254(1).

QUESTION PRESENTED

The question presented is whether a Nebraska special administrator appointed, pursuant to a Nebraska statute, to pursue a cause of action for the exclusive benefit of a widow can, after filing such cause of action, continue to prosecute the cause when the widow, for whose exclusive benefit the cause of action exists, in consideration of benefits paid by the United States, has assigned pursuant to 5 *U.S.C.* 776 at the request of the United States all her right, title and interest in and to such cause of action to the United States—under the decision of the District Court and the court below, the action can continue with the special administrator as plaintiff, even though the United States has not intervened or been substituted as the sole owner of such cause of action, or, stated differently: Whether the decision of the court below in a case of first impression involving a novel and important question is so inconsistent with the purpose and the theory envisioned

**Certified Record, Opinion, p. 3; Judgment, p. 4.

by the Congress as to leave the intent and meaning of a provision of the Federal Employees' Compensation Act, 5 *U.S.C.* 776 in such a state of confusion as to require reversal and modification by this court.

CONSTITUTIONAL PROVISION AND FEDERAL STATUTE INVOLVED

United States Constitution, Article VI, Clause 2, Supreme Law of Land.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"5 U.S.C. 776. Subrogation of United States to employee's right of action; assignment by employee; disposition of moneys collected from person liable

"If an injury or death for which compensation is payable under sections 751-756, 757-781, 783-791 and 793 of this title is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary may require said beneficiary to prosecute said action in his own name. Any employee who is required to appear as a party or witness in the prosecution of said action is, while so engaged, in an active duty status.

"If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under sections 751-756, 757-781, 783-791 and 793 of this title.

"The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such realization or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury. As amended Sept. 13, 1960, Pub. L. 86-767, Title II, Sec. 207, 74 Stat. 908."

STATE STATUTE INVOLVED

"Revised Statutes of Nebraska, 1943, Section 30-809

"Action for wrongful death; creation. Whenever the death of a person shall be caused by the wrongful act, neglect or default, of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

"Revised Statutes of Nebraska, 1943, Section 30-810

"Action for wrongful death; limitation; in whose name brought; judgment; disposition of avails; compromise of claim; procedure. Every such action, as described in section 30-809, shall be commenced within two years after the death of such person. It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons. A personal representative shall not compromise or settle a claim for damages hereunder until the court by which he was appointed shall first have consented to and approved the terms thereof. The amount so received in settlement, or recovered by judgment, shall be reported to and paid into such court for distribution, subject to the order of such court, to the persons entitled thereto after a hearing thereon and after notice of such hearing and of the time and place thereof has been given to all persons interested by publication three successive weeks in a legal newspaper published within the county or, if no legal newspaper is published within the county, then in a legal newspaper published in an adjoining county; Provided, such amount shall not be subject to any claims against the estate of such decedent."

STATEMENT

Respondents (plaintiffs below) filed a complaint for wrongful death on March 27, 1958. Actually one plaintiff,

Arthur E. Perry, filed the action as special administrator of the estate of James W. Sullivan, deceased. Another plaintiff, Colene Sullivan, joined in the action as the widow of Mr. Sullivan. The last plaintiff joined in the action as the daughter of Mr. Sullivan. Jurisdiction was based on diversity of citizenship with the requisite amount in controversy. The suit was brought pursuant to a Nebraska statute for the exclusive benefit of the widow and next of kin of James W. Sullivan. Mr. Sullivan was killed while flying as a Captain in the United States Air Force a B-47 aircraft manufactured by Petitioner. His flight was for the Air Force under Air Force orders.

Plaintiffs asserted a right to recover from Petitioner due to negligent acts designated as failure to exercise due care in the designing, manufacturing, fabricating, inspecting and servicing of the B-47 aircraft and delivering to the United States a defective and unairworthy aircraft (R. 2-5).

The widow sought compensation from the United States under the Federal Employees' Compensation Act, 5 *U.S.C.* 776. Pursuant thereto she was paid at the time of assignment of the cause of action over $20,000.00 by the United States and the United States was committed to pay her over a period of the next 13 years additional sums aggregating approximately $80,000.00. As a result of such payments and pursuant to 5 *U.S.C.* 776, the United States asked for and obtained on April 15, 1958, an assignment from Mrs. Sullivan as widow of James W. Sullivan and as parent of Cynthia L. Sullivan and Dennis L. Sullivan (the assignment (R. 7) made in consideration of the payments received and to be received from the United States) reciting that the widow did

> "* * * sell, assign, transfer and set over to the United States of America all my right, title, and in-

terest in and to my claim for damages against Boeing Airplane Company * * * together with all rights of action thereunder."

Petitioner ascertained in 1960 that the assignment had been made and filed an affidavit, attaching such assignment thereto, and moved for summary judgment (R. 5-6).

The District Court determined on August 7, 1962, that the action could continue without the intervention or substitution of the United States. The District Court's order (R. 11) was dated September 10, 1962. It further recited:

> "The Court further finds and is of the opinion that the instant order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Thereafter Petitioner sought and obtained from the Court of Appeals permission to appeal pursuant to 28 *U.S.C.* 1292(b). The Court of Appeals, after hearing, determined on September 16, 1963, that the District Court properly overruled the motion for summary judgment and that the matter should be remanded for further proceedings. A petition for rehearing was duly filed and overruled by the Court of Appeals on October 16, 1963.

REASONS FOR GRANTING THE WRIT

In Holding That a Special Administrator Appointed Pursuant to a Nebraska Statute Could Prosecute a Cause of Action Assigned to the United States by the Person for Whose Exclusive Benefit the Special Administrator Acts, the Court Below Ignored the Supremacy Clause of the United States Constitution, Emasculated the Pertinent Federal Statute, 5 U.S.C. 776, and Violated the Basic Principle That Litigation Must Be Prosecuted by the One Who under the Substantive Law Owns the Cause of Action. The Federal Statute Providing for Assignment of Causes of Action by Those Covered under the Federal Employees' Compensation Act Envisions a Uniform Federal Policy, Which Is Completely Thwarted by the Decision Below. Such Federal Statute Has Not Been, But Should Be, Construed and Upheld by This Court. The Decision Below Conflicts in Principle with All Other Decisions Construing 5 U.S.C. 776.

The court below brushed aside consideration of the Federal Statute, 5 *U.S.C.* 776, stating, "The statutory assignment had no effect whatsoever upon the exclusive right of the Nebraska Administrator to bring and maintain the suit * * * Since the Administrator is the real party in interest * * *" the suit is properly maintainable by such administrator without the United States being a party. This is the whole opinion upon the point. The decision of the court below in so brushing aside the pertinent Federal statute 5 *U.S.C.* 776, is so inconsistent with the theory and purpose thereof as to leave the intent and meaning of such Congressional enactment in a state of confusion. This Court should speak to bring clarity from chaos.

The cause of action for wrongful death asserted against Petitioner was brought by a Nebraska special administrator

acting for the exclusive benefit of the widow and next of kin of one James W. Sullivan. After the institution of such action, the widow and next of kin, at the request of the United States and in consideration of payments made and to be made by the United States aggregating approximately $100,000.00, assigned to the United States all of her right, title and interest in and to any cause of action against Petitioner. The cause of action asserted was one for wrongful death and arose under a Nebraska statute. The court below determined that the Nebraska statute was the sole statute involved and that the special administrator envisioned thereby was the only person who could bring and control the litigation. It determined that the rights of the United States were only the widow's rights and that it could not acquire any different status than as a beneficiary of the cause of action asserted under a Nebraska statute by the special administrator.

Such decision of the court below ran afoul of the Supremacy Clause of the United States Constitution and completely emasculated the pertinent Federal statute, 5 *U.S.C.* 776. This is a case of first impression. The problem presented is the construction of an important Federal statute and involves a novel and important question.

The Supremacy Clause of the *United States Constitution*, Article VI, Clause 2, has as its obvious purpose a resolvement of any conflicts between Federal and State law, in favor of course of the Federal provision so that in all matters covered by the Federal Constitution the law would be uniform throughout these United States—despite any particular statute of any state. Thereunder this Court has repeatedly held that where a conflict arises the state statute must yield and the Federal statute must prevail. Such is the direct holding of this Court in *Maynard* v. *Durham & Southern R. Co.*, 365 U.S. 160,

5 L. Ed. 2d 486 (1961). For a more recent pronouncement to the same effect see *Sperry* v. *Florida*, 373 U.S. 379, 10 L. Ed. 2d 428 (1963), and *Free* v. *Bland*, 369 U.S. 663, 8 L. Ed. 2d 180 (1962).

All of our states have enacted statutes changing the common law and providing for the survival of an action for wrongful death. The instant litigation is brought pursuant to one of such statutes in Nebraska. The cause of action that survives by Nebraska statute is one for the exclusive benefit of the widow and next of kin. It sounds in tort and is not assignable under the state law. The special administrator can proceed only for the exclusive benefit of the widow and next of kin. The decisions below would have such administrator proceed for the benefit of the United States contrary to the Nebraska statute and the applicable Federal statute.

The Congress in its wisdom enacted Section 776 of 5 *U.S.C.* as a part of the Federal Employees' Compensation Act. It was enacted to give the United States the right, where it was paying compensation, to obtain by assignment any right of action the beneficiary of the bounty of the United States had against any third party. The Act itself and its legislative history (See Vol. 53 of the *Congressional Record*, History of H.R. 15316, Appendix C p. A11), make it clear that the Congress understood that the tort it was considering, the action for wrongful death, was not assignable under the state law and that it, by enacting 5 *U.S.C.* 776 was superseding the state law and providing for the protection of the United States. Its plan was simple: The beneficiary of such a wrongful death action could either proceed against the third party tortfeasor or could obtain compensation from the United States. If such beneficiary obtained compensation from the United States, the United States could require an assign-

ment of the cause of action from such beneficiary which would place the full power in the hands of the United States to either proceed with, settle, or ignore the cause of action for wrongful death. The duty of the United States as envisioned by the Congress, once such an assignment was requested and obtained, was to prosecute, to ignore, or to compromise the cause of action, as the United States saw fit, and to account to the beneficiary if, and only if, the United States asserted and recovered in such wrongful death action an amount greater than the compensation payable under the Federal Employees' Compensation Act by the United States to such beneficiary.

This Congressional enactment has been recognized by several of our Courts of Appeals. In the 6th Circuit it was determined in *Louisville & Nashville R. R. Co.* v. *Rochelle*, 252 F.2d 730 (1958), that the United States could have required the beneficiary to assign the cause of action to the United States but without such an assignment the United States had no right to bring the action and was not a proper party in the beneficiary's action for wrongful death, despite its first right to the proceeds. This is the uniform holding of the Courts of Appeals (prior to the decision of the court below) as note *United States* v. *Klein*, 153 F.2d 55, 8th Circuit (1946), and note in accord state court cases, *Cox* v. *Detroit United Ry.*, 238 Mich. 527, 213 N.W. 710 (1927); *Chiles* v. *Rohl*, 47 S.D. 580, 201 N.W. 154 (1924); *Drake* v. *New York State Electric & Gas Corp.*, 294 N.Y.S. 227 (1937); *Wood* v. *Ford Garage Co.*, 293 N.Y.S. 999 (1937), affirmed 300 N.Y.S. 1358 (1937); *Lassell* v. *City of Gloversville*, 217 N.Y.S. 128 (1926); *Morgan* v. *Woodruff*, 208 S.W.2d 628 (Tex. Civ. App.) (1948); *Wagner* v. *City of Duluth*, 211 Minn. 252, 300 N.W. 820 (1941); *Cary* v. *Burris*, 169 Ore. 24, 127 P.2d 126 (1942); *Oklahoma City*

v. *Caple*, 187 Okla. 600, 105 P.2d 209 (1940); *Dempster Mill Mfg. Co.* v. *Wiley*, 131 S.W.2d 257 (Tex. Civ. App.) (1939).*

The right of the United States to proceed as the plaintiff after assignment has been recognized by the 2d Circuit as note *United States* v. *New York Foreign Trade Zone Operators*, 304 F.2d 792 (1962).

The matter has not reached this Court. In all the courts where the problem has been determined a basic principle is enunciated: Prior to assignment by the beneficiary to the United States, the United States does not own a cause of action; can not assert the cause of action created by the state statute and is not even a proper party to such a cause of action maintained by the beneficiary. We submit that the corollary to such principle should be just as uniformly recognized: Once the United States pays compensation and asks for and obtains an assignment of the cause of action from the beneficiary, the United States does own the cause of action and is the only person who can prosecute and maintain such cause of action, albeit established under the state law but assigned to the United States pursuant to the Federal law, 5 *U.S.C.* 776.

The intent and purpose of the Congressional enactment is obvious. It was passed to enable the United States to protect its own interests and, after payment of compensation to a beneficiary covered under the Federal Employees' Compensation Act, to obtain an assignment of whatever cause of action existed under state law and to maintain,

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*In some of these cases, assignment by the beneficiary of amounts paid by the United States, out of proceeds to be recovered, is held not to be a statutory assignment of the cause of action. Such non-statutory assignment does not give the United States the right to join the action, *e. g.*, *Dempster Mill Mfg. Co.* v. *Wiley*, 131 S.W.2d 257 (Tex. Civ. App.) (1939). The instant assignment is a statutory assignment by its own terms.

prosecute, settle or ignore such cause of action in whatever manner the United States determined it should act, without interference, suggestion or bother from any other person, be it a special administrator, beneficiary or anyone else. The sole duty of the United States, after the assignment by such beneficiary, as clearly enunciated by the Congress is one of accounting to such beneficiary in the event, and only in the event, that the United States in the cause of action it determines to assert recovers more than the amount of compensation payable by it to such beneficiary, plus the expense of such realization or collection.

This litigation presents a simple problem. The United States owns the cause of action. As the owner it alone must maintain the cause of action. The court below in not recognizing the United States as the owner of such cause of action made the Nebraska statute superior to the Federal statute. In so doing it clearly erred and should be straightened out by this Court. The basic principle involved is the supremacy of the Federal law under the Federal Constitution. The matter is only an application of the principle uniformly recognized in our Federal system of jurisprudence as note 2 *Barron & Holtzoff, Federal Practice and Procedure*, Sec. 482, pp. 7-9

> "* * * Most authorities agree that the 'real party in interest' is the party who, by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery * * *"

Under the Federal statute, 5 *U.S.C.* 776, the United States is the party which by the substantive law and Federal statute possesses the right sought to be enforced. The Nebraska statute created the cause of action. Under the Federal statute such cause was assigned to the United

States. Thereafter the United States and it alone could assert such cause. The court below clearly erred in determining that the litigation could proceed in the absence of substitution or intervention by the United States. There is a compelling need in this situation for this court to speak and speak firmly to maintain the supremacy of the Federal law and to achieve the uniformity envisioned by the Congress of these United States.

Respectfully submitted,

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